Staravia Ltd v Consolidated Aeronautics Corp & Ors

HIGH COURT (SINGAPORE) - ORIGINATING SUMMONS NO 886 OF 1987
THEAN J
19 SEPTEMBER 1989

Conflict of Laws - Letters rogatory - Applicability of privilege against self-incrimination - Rules of the Supreme Court 1970, O 39 r 10, O 60, O 66 rr 2(3), 3 & 4(2) - Evidence (Civil Proceedings In Other Jurisdictions) Act (Cap 98, 1985 Ed), ss 4 & 5 - Constitution of the United States of America, Fifth Amendment - Rules of the Supreme Court [UK], O 70 r 6 - Convention on the Taking of Evidence Abroad in Civil or Commercial Matters

There are three parties involved in the present proceedings: the plaintiffs and defendants in the proceedings that are pending before the Superior Court of California and a witness in those proceedings, Jack Goh Jak Kwang from Singapore ('Jack Goh'). The Registrar of the Supreme Court had received a letter of request dated 11 December 1986 from a judge of the Superior Court of California, County of Los Angeles, for international judicial assistance pursuant to The Hague Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters.

The letter of request asked for the taking of evidence here of Jack Goh touching on the matter in dispute in those proceedings. Pursuant to O 66 r 3 of the Rules of the Supreme Court 1970, the registrar forwarded the letter of request to the Attorney General, who on 14 August 1987 also pursuant to r 3 took out this originating summons ex parte, and an order was made appointing the registrar or his deputy as the examiner for the purpose of taking the evidence of Jack Goh. The order was made pursuant to s 4 of the Evidence (Civil Proceedings In Other Jurisdictions) Act (Cap 98, 1985 Ed) ('the Act'). Pursuant to the order, Jack Goh attended before the examiner. In the course of his evidence before the examiner, Jack Goh refused to answer some of the questions put to him claiming privilege against self-incrimination under the Constitution of the United States of America, Fifth Amendment. The letter of request contained the words, in para 16, 'Privilege against self-incrimination; attorney-client privilege'. The examination was not concluded. The plaintiffs brought a motion before the Superior Court of California, County of Los Angeles ('the requesting court'), to seek a ruling on Jack Goh's refusal to answer the questions or in the alternative for an amendment or clarification of the letter of request and, presumably, para 16 thereof. The plaintiffs took out Summons-in-Chambers No 4688 of 1988, and applied for an order that Jack Goh do attend before the examiner to be examined pursuant to the order made and for him to be compelled to answer the questions put to him at the previous examination. The application was opposed by the defendants and Jack Goh.

A preliminary objection was raised both by the defendants and Jack Goh. They claimed that the application, which was expressed to be made under O 66 r 2(3), was wrong. The order obtained by the Attorney General was obtained under s 4 of the Act and O 66 r 3. There was no application by any party 'duly authorized to make the application' on behalf of the requesting court under O 66 r 2, and hence the application by the plaintiffs could not be made under r 2(3). The main and substantive objection by the defendants and Jack Goh to the plaintiffs' application was that by reason of s 5 of the Act, the court could not compel Jack Goh to give any evidence before the examiner which he could not be compelled to give in civil proceedings in the country or territory in which the requesting court exercised jurisdiction. Furthermore, the judge of the requesting court had already ruled that Jack Goh would be entitled to claim the privilege against self-incrimination with respect to the questions asked.

The plaintiffs argued that since Singapore had O 39 r 10 which applies, under which the examiner in this case can act and proceed to record the evidence of Jack Goh, his objection and grounds thereof and the court can direct Jack Goh to answer those questions on which he claimed privilege against self-incrimination, the court could order Jack Goh to answer the questions.

Held, dismissing the plaintiffs' application:

(1) The preliminary objection had no merit. The plaintiffs were plainly an interested party and procedurally might make this application.

(2) Even though the application was procedurally defective, the court would have no difficulty in curing the defects and making the necessary order asked for if the application was sustainable in law.

(3) The objection to the letter rogatory was well-founded and was a complete answer to this application. Firstly, the letter of request by para 16 supported the claim of privilege against self-incrimination made by Jack Goh. The statement fell squarely within para (a) of s 5(2) of the Act. Secondly, the court in California had ruled that Jack Goh would be entitled to the protection against self-incrimination under the Constitution of the United States of America, Fifth Amendment.

Cases referred to

1 *Boeing Co* v *PPG Industries Inc* [1988] 3 All ER 839 (refd)
2 *R* v *Rathbone, ex p Dikko* [1985] QB 630 (distd)

Legislation referred to

Evidence (Civil Proceedings In Other Jurisdictions) Act (Cap 98, 1985 Ed) ss 4, 5
Rules of the Supreme Court 1970 O 39 r 10, O 60, O 66 rr 2(3), 3, 4(4)
Constitution of the United States of America, Fifth Amendment
Rules of the Supreme Court [UK] O 70 r 6

Margaret George (Mrs) for the plaintiffs.
Quek Peck Hong (Ms) for the defendants.
Harish Kumar for Jack Goh Jak Kwang.

Cur Adv Vult

Thean J: There are three parties involved in the application before me: the plaintiffs and defendants in the above proceedings now pending before the Superior Court of California for the County of Los Angeles, 600 East Broadway, Glendale, California 91205, whom I shall refer to as the plaintiffs and defendants respectively, and a witness in those proceedings by the name Jack Goh Jak Kwang of Singapore, whom I shall refer to as Jack Goh. The application arose in this way.

In January 1987 or thereabout, the Registrar of the Supreme Court received a letter of request dated 11 December 1986 ('the letter of request') from a judge of the Superior Court of California, County of Los Angeles, for

international judicial assistance pursuant to The Hague Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters. The letter of request asked for the taking of evidence here of Jack Goh touching on the matter in dispute in those proceedings. Pursuant to O 66 r 3 the registrar forwarded the letter of request to the Attorney General, who on 14 August 1987 also pursuant to r 3 took out this originating summons ex parte, and an order was made on 11 September 1987 appointing the registrar or his deputy as the examiner for the purpose of taking the evidence of Jack Goh; directing Jack Goh to attend before the examiner and submit to be examined on oath or affirmation touching on the matter in dispute in the above proceedings in California, and directing the examiner to take down the evidence of Jack Goh and to transmit the same together with the order and the letter of request to one Nancy L Dassoff of Cutler and Cutler of No 700 South Flower Street, Suite 3222, Los Angeles, California, who is the American counsel representing the plaintiffs in those proceedings. The order was made under s 4 of the Evidence (Civil Proceedings In Other Jurisdictions) Act (Cap 98, 1985 Ed) ('the Act').

Pursuant to the order, Jack Goh attended before the examiner, Mr Foo Chee Hock, on 17, 18 and 19 November 1987 and gave evidence before the examiner. In the course of giving his evidence before the examiner, Jack Goh refused to answer some of the questions put to him claiming privilege against self-incrimination under the Fifth Amendment to the American Constitution. In this connection, the letter of request by para 16 thereof contains the following statement: 'Privilege against self-incrimination; attorney-client privilege', which appear to support the claim made by Jack Goh. The examination was not concluded and was adjourned sine die.

Thereafter, the plaintiffs brought a motion before the Superior Court of California, County of Los Angeles ('the requesting court'), to seek a ruling on Jack Goh's refusal to answer the questions or in the alternative for an amendment or clarification of the letter of request and, presumably, para 16 thereof. On 17 February 1988, the honourable Joseph R Kalin, the judge of the court, ruled against the motion and the following is an extract of the ruling made by the learned judge:

> The court has read and considered the plaintiffs' motion re: deponent's refusal to answer questions on the basis of the privilege against self-incrimination, all opposing papers, points and authorities, the letter from Judge Steven S Weisman, referee (dated 26 January 1988), and the reporter's transcript of proceedings before the said referee on 25 January 1988.
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> Said motion to amend para 16 of the court's letter of request to the Republic of Singapore is denied.
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> If the deponent were giving his deposition in California, he would be entitled to the protections of the United States Constitution. Should he travel to California after having given his deposition in Singapore, his activities and conduct would be governed by the effective laws of California. It is not for this court to impose on a foreign jurisdiction the laws of this forum, and if this court did, the foreign jurisdiction could ignore this court's directions.
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> It is the opinion of this court that the deponent, since this action is governed by California law, would be entitled to the rights and protections of California law should he choose to exercise the said rights.

On 4 August 1988, the plaintiffs took out this Summons-in-Chambers No 4688 of 1988, applying for, inter alia, an order that Jack Goh do attend before the examiner to be examined pursuant to the order made on 11 September 1987; that he be compelled to answer the questions which had been put to him during the examination held on 17, 18 and 19 November 1987 and to which he had taken objections on the ground of privilege against self-incrimination, and that on such examination the examiner do record or cause to be recorded all questions put to Jack Goh and the answers given and of any objections taken. The application is opposed by the defendants and Jack Goh.

First, there is a preliminary objection raised both by Ms Quek for the defendants and Mr Kumar for Jack Goh. They pointed out that the application was expressed to be made under O 66 r 2(3); that they said was wrong. The order dated 11 September 1987 was applied for and obtained by the Attorney General under s 4 of the Act and O 66 r 3. There was no application by any party 'duly authorized to make the application' on behalf of the requesting court under O 66 r 2, and hence this application by the plaintiffs could not be made under r 2(3). In reply to this objection, Mrs George for the plaintiffs submitted that the application was made under O 39 r 10 which by virtue of O 66 r 4(2) applies with necessary modifications. This application, she submitted, was consequent on the deposition of Jack Goh before the examiner and was properly constituted; the plaintiffs were a party interested in the proceedings in the requesting court and therefore a proper party to make the application. In support, she relied on *Boeing Co* v *PPG Industries Inc.*[1] In my judgment, this preliminary objection has no merit. The plaintiffs are plainly an interested party and procedurally may make this application. Though I agree with Ms Quek that the application was wrongly expressed to be made under O 66 r 2(3) and that some of the prayers contained therein are either superfluous or a repetition of what has been set out in the previous order, the substance of the application is for an order to compel Jack Goh to answer the questions which he refused to answer on the ground of privilege against self-incrimination and for such evidence to be recorded and remitted to the requesting court. If the application is sustainable in law, I do not envisage any difficulty in curing the defects and making the necessary order asked for.

The main and substantive objection to the plaintiffs' application is that by reason of s 5 of the Act, the court

cannot compel Jack Goh to give any evidence before the examiner which he could not be compelled to give in civil proceedings in the country or territory in which the requesting court exercises jurisdiction. Section 5 of the Act, insofar as relevant, provides as follows:

> (1) A person shall not be compelled by virtue of an order under section 4 to give any evidence which he could not be compelled to give -
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> (a) in civil proceedings in the High Court in Singapore; or
> (b) subject to subsection (2), in civil proceedings in the country or territory in which the requesting court exercises jurisdiction.
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> (2) Subsection (1)(b) shall not apply unless the claim of the person in question to be exempt from giving the evidence is either -
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> (a) supported by a statement contained in the request (whether it is so supported unconditionally or subject to conditions that are fulfilled); or
> (b) conceded by the applicant for the order, and where such a claim made by any person is not supported or conceded as aforesaid he may (subject to the other provisions of this section) be required to give the evidence to which the claim relates but that evidence shall not be transmitted to the requesting court if that court, on the matter being referred to it, upholds the claim.

It is Mr Kumar's submission that in this case, s 5(1)(b) is wholly applicable as Jack Goh's claim of privilege on the ground of self-incrimination is supported by a statement contained in the letter of request. Accordingly, sub-s (2) of s 5 has no application at all. Further, the judge of the requesting court had already ruled that Jack Goh would be entitled to claim the privilege against self-incrimination with respect to the questions asked. Therefore, he, Jack Goh, cannot be compelled to give the evidence which he could not be compelled to give in civil proceedings in the requesting court.

I am in entire agreement with Mr Kumar. The objection is well-founded and is a complete answer to this application. Firstly, the letter of request by para 16 supports the claim of privilege against self-incrimination made by Jack Goh. This statement, in my view, falls squarely within para (a) of s 5(2) of the Act. Secondly, Judge Kalin had ruled that Jack Goh would be entitled to the protection against self-incrimination under the Constitution of the United States of America, Fifth Amendment.

Mrs George relied on the decision of Forbes J in *R* v *Rathbone, ex p Dikko*.[2] In that case, the evidence of one Dr Dikko was needed in an action in the district court of the Southern District of New York to recover the value of a cargo of rice that had been delivered in Nigeria. The defendant in that action upon receipt of letters of rogatory from the New York Court applied ex parte for an order under the Evidence (Proceedings In Other Jurisdictions) Act 1975 and O 70 of the Rules of Supreme Court - that Act and O 70 are in pari materia with our Act and O 60 respectively - and an order was made appointing an examiner and directing Dr Dikko to appear before the examiner. Dr Dikko thereupon applied to have the order for his examination set aside, but the application was refused by the master. Thereafter, the examination of Dr Dikko was arranged and proceeded for two days. In the course of the examination, the examiner treated Dr Dikko as a hostile witness. Dr Dikko then applied for judicial review and for an order of prohibition preventing the examiner from conducting the examination and also for an order of certiorari quashing the examiner's decision that the applicant be treated as a hostile witness. The application was heard before Forbes J. There were also two other matters that were before him: Dr Dikko appealed against the decision of the master refusing to set aside the order for his examination, and he filed a notice of motion for various orders including an order seeking to terminate the appointment of the examiner and a fresh appointment of another examiner. All these three matters were dismissed or rejected by Forbes J.

Mrs George quoted at great length the following passage of the judgment of Forbes J at pp 648-649:

> The High Court in this country, in deciding the validity of any objection, would therefore, I think, bear in mind that, other things being equal, it is better for answers which would be inadmissible in the foreign jurisdiction to be recorded (when the foreign court can order them to be struck out) than for answers which might be admissible in that court to be missing because the High Court had ruled them inadmissible.
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> An examination of the Act of 1975 and of the rules in the light of this general principle seems to show: (a) the examiner has, subject to the special case of a claim to privilege, no discretion to rule on any objection, though he must state to the parties his opinion on the matter; (b) in forming his opinion he should, in general, be guided by the principle I have stated above; namely, that it is better that an inadmissible answer should be given than that an admissible answer should not be recorded; (c) the examiner having stated his opinion, the witness may answer or may not. If he does answer the examiner must record that answer. If he does not, then it is open to the party who obtained the order for the examination to go back to the court and to obtain ex parte an order, under RSC O 39 r 5, requiring the witness to answer; (d) concurrently, or alternatively, either party may ask the court to decide on the validity of an objection under RSC O 39 r 10; (e) in deciding the question of validity the court should, it seems to me, bear in mind the general principle I referred to previously; (f) in the special case of an objection taken by the witness to answering a question on the ground of privilege, the examiner has a discretion to require the witness to answer, whereupon the special arrangements of O 70 r 6, apply; (g) if the examiner in such a case does not require the witness to answer, the party obtaining the order for examination may apply ex parte for an order of the court.
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> It will be seen from the above that the examiner has, in general, no power to rule on any objection and no power to require a witness to answer any question. If a witness refuses to answer a question, then in the ordinary case the party obtaining the original order can go back to the court and obtain a further order requiring the witness to answer. In the special case of a claim to privilege, the examiner has the power

to overrule the objection and require the witness to answer. A witness who nevertheless refuses to answer may be dealt with under O 39 r 5. If he has not been required to answer by the examiner, and refuses to answer, he may be required by the court to answer on a similar ex parte application under O 70 r 6.

She relied on this passage of the judgment and submitted that it was not for the examiner to make a ruling (which in fact he did) that Jack Goh be allowed to refuse to answer questions on the ground of privilege against self-incrimination, and submitted that it is for the court to decide on such a ruling. Hence she asked this court to make an order directing Jack Goh to answer the questions which he refused to answer before the examiner, and she urged the court to follow the principle laid down by Forbes J, that is to say, that other things being equal, it is better for answers which would be inadmissible in the foreign jurisdiction to be recorded (when the foreign court can order them to be struck out) than for answers which might be admissible in that court to be missing because the court here has ruled them inadmissible. Mrs George, however, accepted that our O 66 does not have the corresponding provision of O 70 r 6 of the Rules of the Supreme Court in England, but she contended that s 5(2) of our Act provides in substance what is set out in detail in r 6. At any rate, she argued, we have O 39 r 10 which applies, under which the examiner in this case can act and proceed to record the evidence of Jack Goh, his objections and grounds of objection, and the court can direct Jack Goh to answer those questions on which he claimed privilege against self-incrimination and direct that these answers be set out separately, and then remit them to the requesting court which could then strike them out if they really offend the privilege of self-incrimination.

I am unable to accept her argument and accede to her request for the order. In this case, having regard to para 16 of the letter of request and the ruling already made by the requesting court, s 5(1) of the Act applies and Jack Goh cannot be compelled to give evidence which he could not be compelled to give in those proceedings before the requesting court. The passage of the judgment of Forbes J does not support her case. In that case, there was no statement in the letter of rogatory in support of any privilege; nor was such privilege conceded by the defendant: see the judgment of Forbes J at p 650. It seems to me that the passage of the judgment of Forbes J relied upon by Mrs George would be applicable if s 5(2) of the Act applies, which in this case it does not.

In the result, I dismiss this application with costs to the defendants and Jack Goh.

Application dismissed.

Solicitors: *David Ong & Lim; Colin Ng & Partners; Chor Pee & Co.*

Reported by *Terence Tan Bian Chye*

Dynacast (S) Pte Ltd v Lim Meng Siang & Ors

HIGH COURT (SINGAPORE) - SUIT NO 1140 OF 1989
CHAO HICK TIN JC
25 AUGUST 1989

Civil Procedure - Injunction - Anton Piller order - Affidavit in support of application for order - Failure to state source of belief - Whether failure to make full and frank disclosure - Whether non-disclosure innocent or not - Whether non-disclosure was mere irregularity - Whether order could be discharged after execution - Articles seized under order to be used for another purpose - Rules of the Supreme Court 1970, O 2 r 1, O 41 rr 4, 5(2) & O 92 r 4 - Rules of the Supreme Court 1883 [UK], O 38 r 3

The plaintiffs are manufacturers of plastic and metal components. The defendants are former employees of the plaintiffs. The aim of the present action was to restrain the defendants from using the plaintiffs' confidential and proprietary information and property without the plaintiffs' consent and to require the defendants to return to the plaintiffs all books, equipment, software and other property of the plaintiffs which are in the defendants' possession. The plaintiffs were granted an ex parte Anton Piller order allowing them to enter the defendants' premises to search and seize certain specified documents and articles ('the articles'). This order ('the order') was executed and certain items were seized. The defendants then applied by motion to the court to discharge the order, to order the plaintiffs to return the seized items and to inquire as to the damage suffered by the defendants. It was argued that the plaintiffs had failed to make full and frank disclosure when applying for the order; that there was inadequate evidence before the judge to have granted the order; and that the plaintiffs did not really have a cause of action but were just fishing. The plaintiffs' affidavit in support of the application for the order was affirmed by their managing director.

Held, allowing the defendants' application:

(1) The plaintiffs' statement of claim clearly set out the cause of action and the reliefs sought by the plaintiffs. The application for the order also specified the articles sought. The allegation of fishing was thus unmeritorious.

(2) Recent English cases have stated that although a failure to make full and frank disclosure was sufficient to lead to the court discharging an interim ex parte order, if justice required, the court could exercise its discretion and continue the order or grant a fresh order.

(3) The discretion had to be exercised sparingly and the original non-disclosure had to be innocent. A non-disclosure was innocent where there was no intention to omit or withhold information which was thought to be material.

(4) A judge who grants an interim order without a written application, would have recorded in brief the facts and points mentioned by counsel. Counsel is then expected to swear and file an affidavit setting out what he told the judge. This situation could not be equated with the situation of the plaintiffs in the present case.

(5) The consequences of admitting such evidence could be serious. It could undermine the principle of full and frank disclosure. If there is a point of importance not covered by the affidavit and counsel would like to convey the same to the judge, the proper course would be for counsel to request the judge to